

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-226

CATHERINE JANETTE SMELSER
APPELLANT

V.

CHARLES LEDELL SMELSER
APPELLEE

Opinion Delivered October 8, 2008

APPEAL FROM THE COLUMBIA
COUNTY CIRCUIT COURT,
[NO. E2001-204-1]

HONORABLE HAMILTON H.
SINGLETON, JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Appellant, Jan (Smelser) Loe, sought a change of custody for her thirteen-year-old son Josh. Custody of Josh had been changed in 2004 from joint custody of the parties to full custody with appellee, Charles Smelser. The trial court denied appellant's August 15, 2006 motion for change of custody, concluding that appellant had failed to demonstrate a material change of circumstances. In this one-brief, fact-intensive appeal, appellant contends that the trial court's ruling on the question of whether she proved a material change in circumstances was clearly erroneous and was based on an improper interpretation of the law. We affirm.

Standard of Review

In *Hamilton v. Barrett*, 337 Ark. 460, 465-66, 989 S.W.2d 520, 523 (1999), our supreme court set forth the well-settled standard of review for appellate courts in custody cases:

In reviewing [equity] cases, we consider the evidence *de novo*, but will not reverse a [trial court's] findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). We give due deference to the superior position of the [trial court] to view and judge the credibility of the witnesses. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). This deference to the [trial court] is even greater in cases involving child custody, as a heavier burden is placed on the [trial court] to utilize to the fullest extent [its] powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Anderson v. Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). Where the [trial court] fails to make findings of fact about a change in circumstances, this court, under its *de novo* review, may nonetheless conclude that there was sufficient evidence from which the [trial court] *could* have found a change in circumstances. *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988). Our law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). A judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the [trial court] or were not known by the [trial court] at the time the original custody order was entered. *Jones*, 326 Ark. 481, 931 S.W.2d 767. Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Id.*

A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake as been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999).

For ease of discussion, appellant's point of appeal is divided into two subparts. She contends 1) that the trial court's finding that there had been no material change of circumstances was clearly erroneous, and 2) that it made an error of law in focusing on the *custodial* parent's circumstances.

1) *Clear error*

In support of her argument that the trial court clearly erred in finding that there were no material changes of circumstances, appellant lists the following alleged changes that she contends are material and demonstrate clear error in the trial court's conclusion otherwise:

1. Jan Loe has moved back to the state of Arkansas. She has steady employment at Fallin Tractor. She has a steady home. She will inherit the home and acreage of her deceased mother, Cathy Lentz, in Columbia County[.]
2. The oldest child, Jimmy Smelser, testified that the biggest mistake he ever made was to testify previously that he wanted to live with his father. He was treated poorly by his stepmother soon after court and moved out from his father's house soon after he turned 18. Jimmy wound up graduating from high school and spending the lion's share of his senior year away from his father because he was so miserable being subjected to his stepmother.
3. Josh Smelser is now 13 years old. He cannot stand being around his stepmother and wants to live with his mother.
4. Jan Loe has been alienated from Josh by Charles Smelser. There was ample testimony that her side of the family has been alienated as well. Jimmy Smelser has been alienated from his brother and told that he is no longer welcome at his father's house. Grandparents have been alienated. Charles Smelser has kept Josh from his paternal grandmother and aunt. The only time that Josh visits with them is when he is with Jan Loe. Clearly, there is an obvious intent by Charles Smelser to keep this child alienated from individuals with whom Mr. Smelser has disagreements.
5. Three years ago the court was led to believe that Charles Smelser's wife, Paige, had only one child. This was not true. She has a son by the name of Jonathan, who she gave up physical custody of to a stepfather and whose very existence she denied.
6. The stepsister, Crystal Cravey, has run away from home twice since the last custody order was entered. Both times the mother and stepfather "did not have a clue," that anything was going on. The young lady is sexually active and has been kicked out of school for taking alcohol there.
7. Charles Smelser has not played catch with Josh for over three years. He has not fished with Josh in over three years. He has not had a meaningful conversation with Josh for over a year until the day before the trial.

8. There is a disparity of treatment. Crystal Cravey is involved in tennis, and even though she has run away twice, is sexually active and has been kicked out of school for taking alcohol there, she will be allowed by her mother to be on the tennis team at Magnolia High School. However, when Josh does something as mundane as not cleaning up his room or “back talks,” he misses out on his baseball and other extracurricular activities.

9. The partner of Charles Smelser is a detriment to the health and welfare of Josh Smelser. She has had the opportunity to touch four young lives, and has been a detriment to every one of them. Jonathan, her oldest son, did not want to live with her for the lion’s share of his teenage years. He spent those with an ex step-parent. Her only daughter has run away from her twice. Her oldest stepson moved out within two weeks of turning 18 because he could not stand being around her. Now, the youngest stepson no longer wants to be around her. To quote Paige Smelser, “I demand respect.” If Josh disagrees with her he is “smart mouthing” and either gets sent to his room, bullied, or popped in the mouth.

10. Mr. Smelser has done everything within his power to be uncooperative in allowing Jan Loe to communicate with her son, allowing Paige to hang up on his ex-wife, allowing Paige to send his oldest son away and tell him he is not welcome at the house and allowing Paige to control who Josh can talk to and not allow Josh to answer the telephone. It is clear that Charles Smelser does not want to cooperate with Jan Loe.

The “changes” alleged by appellant, and quoted above, primarily involve appellee’s wife, Paige, whom appellant asserts makes Josh’s life miserable; made the parties’ oldest child, Jimmy, miserable when he lived there; cannot control her own daughter, Crystal, who has run away from home on two occasions, been suspended from school for having alcohol on campus, and is sexually active; and treats Crystal and Josh disparately, being harder on Josh for less serious offenses. In addition, appellant asserts that appellee has alienated himself from Josh, from his own extended family, and from his oldest son, Jimmy, and that he is uncooperative in his dealings with her concerning Josh. Further, she points out that she now has steady employment, steady housing, and that she will inherit her deceased mother’s house

and acreage.

At the hearing on appellant's motion, Josh testified that he was thirteen years old; that he was doing "pretty well" in school, making A's, B's, and C's; that he played the trumpet in band; that he was involved in the youth choir at First Baptist Church; and that he was looking forward to a church youth trip that summer. He explained that he plays baseball for the American Legion and that he had missed some games because his stepmother said he was being disrespectful. Josh stated that he wanted to live with his mother now because it was more relaxing and laid back at her house; that it was stressful at his dad's house because there was a lot of arguing; that his stepsister had run away from home on two occasions; that it was his belief that he was disciplined differently and in a way that was really unfair; that his dad does not coach him in baseball anymore, but that he has gone to practice with him; that it has been more than three years since he and his dad have played catch in the yard and gone fishing alone; that they went deer hunting one time last deer season; that his dad used to be more laid back; that it had probably been over two years since he and his dad had had a heart-to-heart talk; and that the last time he was allowed to have a friend spend the night was on his eleventh birthday.

Josh acknowledged that his dad let him call his mother, but he explained that he was "not much of a phone call type of person." He testified that his dad paddled him two weeks ago when he was disrespectful to his stepmother. Josh explained that he told Paige she was a bitch because she told him he had to return a pair of football cleats to his mother's house. He stated that his dad was not home when it happened because he was at a Boy Scout

meeting, but that he got the “whipping” when his dad got home. He explained that some family friends had given him their son’s football cleats; that they were the correct size; and that his dad told him they “would do” until they could get him some. He stated that his mother subsequently took him and his brother to a Texas Rangers’ game in Dallas and that she bought him some cleats at a sporting goods store. It was those cleats that he was made to return to his mother’s house. He said that his dad then bought him the same football cleats, except in a different color. He said that he thought the whole episode was stupid. Josh testified that he thought his stepsister smoked, but that he could not prove she did, and that she never talked about anything of a sexual nature between her and other boys.

Josh testified that he loved his father and that he thought his father loved him, too. He explained that his mother was more affectionate than his father. He said that if the judge did not let him live with his mother permanently, he would like to have increased visitation with her; that spending a couple of school nights with his mother, in addition to the every other weekend arrangement that was currently in place, “would be a pretty good idea for me.” Josh acknowledged that he is involved in “a whole lot of activities” and that when he is participating in those activities, he is having fun with his classmates and peers. He said that the baseball players and choir members are his friends and that they have a chance to “kid around.” He said that he has not been forbidden to have friends to his father’s house; that he has not been forbidden to go anywhere with friends; and that, as far as he knows, his brother Jimmy has not been forbidden to come to his father’s house. He said that he sees his brother on a regular basis at his mother’s house, but not at his father’s house. He acknowledged that

he is “not big on the telephone”; that he does not initiate a lot of phone calls; that he does not like calling people; and that it is by his choice. He said that he had never heard his father or stepmother denying him the opportunity to talk with other family members.

Josh explained that he wanted to spend more time with his mother and that he thought he would be happier living at his mother’s house, but that he was not miserable living with his father – “just not quite happy all the time.” He said that the only thing keeping him from being happy all the time at his dad’s house was his stepmother. He acknowledged that, every night, his dad hugs him and tells him that he loves him, and that his dad does not talk bad about his mother. He acknowledged that his mother at times talked bad about his father and stepmother. He said that he experiences anxiety and stress because of his stepmother, but acknowledged that he “occasionally can be insubordinate and not cooperative.” He said that it was fair to say that he had probably deserved some of the punishments that he had received. He acknowledged that his father and stepmother “are never ugly and abusive to me.” He explained that he gets to see his paternal grandfather about three or four times a week; that he gets to see his cousin at church; and that if he wanted to invite his cousin over, he probably could if his room was clean.

Josh acknowledged that he does not hunt or fish or play ball with his mother. He stated that he and his dad are very involved in Boy Scouts together; that he is striving to be an Eagle Scout; and that is something he and his father have always done together. He said that his stepmother has now joined them in the Boy Scout meetings, which are every Tuesday night. He said that his baseball team usually plays at six o’clock on Mondays and Thursdays;

and that his youth choir is Sunday evenings. He stated that his father is a Boy Scout troop leader and that he is about to take over as Scout Master. He said that his stepmother would be the Assistant Scout Master. He said that he and his father and stepmother sometimes take family vacations together; that last year they went to Lake Chicot and fished and camped. He explained that the punishment he receives when he is disrespectful is to miss his next baseball game; that he has missed four or five games and gone to three or four games so far this year. He stated that he does not complain to his dad about being stressed or uptight; that his dad had just recently started him back in counseling and on medication; that he thought it would help if his dad and stepmother were incorporated into those sessions; and that he would like family counseling and thought it might help solve the issues he and his stepmother were having with each other. He said that he and his stepmother are always arguing over “stupid stuff”; that she will tell him he is not supposed to wear a certain shirt to school because it is a play shirt, and that he will say he thought it was a school shirt; and that she will think he is smarting off.

Jimmy Smelser, Josh’s brother, explained that in 2004, his preference was to live with his father, but that their relationship took a downward turn, and he left the home five months later when he turned eighteen. He acknowledged that during that period of time, his relationship with his girlfriend, Sarah, who is now his wife, was escalating and that he wanted to go to her house every morning and wake her up, but that his father thought that was inappropriate. He stated that now that his mother is back in Arkansas, he gets to see Josh frequently. He acknowledged that prior to a very recent incident in which Paige told him

he was not welcome at their house, that he had never been denied access to his father's house. He acknowledged that Paige had never been physically abusive to either him or his brother; that their problem with her was that she would bait them, try to make them mad, and then when they got mad, they would get in trouble.

Appellant testified that she is able to satisfy her financial obligations; that she lives in a fourteen-by-sixty foot mobile home; that Josh has his own room and bathroom; that she will soon move into her deceased mother's house; that the house is on ten acres of land; that it is in the same school system; that her health is good; that when sole custody of the children was awarded to appellee in 2004, the trial court was concerned about her living with someone of the opposite sex without being married; that she made mistakes; that she has grown a lot since then; and that she now regularly attends church. Appellant described her history of housing and jobs. She stated that she had lived in at least four residences since the change of custody in 2004 and that she had had several jobs in that time frame as well. She stated that Josh loves his father and that Josh's concerns about his father are that he does not get to spend enough time with him.

Appellant explained that she initiated the change-of-custody action because Josh was unhappy; that he is not allowed to have friends visit at his father's house; and that Paige is confrontational with her. She stated her belief that appellee has changed over the last three years and that he is alienating his son from other people "just for control." Appellant explained that after the 2004 change of custody to appellee, she married a man named Doug James in December 2005, left him in May 2006, and divorced him in December 2006. She

stated that she and Jim Mayfield have been friends since September 30, 2006; and that she is strictly friends with Richard Lee from church, even though they have some social interaction outside of church. She stated that she knew Josh had been denied permission to call her; and that since the 2004 order, she has never made a derogatory remark about appellee or Paige.

Myrtis Blankenship, appellant's grandmother, generally testified that appellee and Paige had severely limited her interaction with Josh.

Jerri McAdams, a long-time friend of appellant's, testified that appellant was having a very hard time in 2004 but that she now regularly attends church and, that if something bad happened to McAdams, she would have no problem with someone like appellant raising her kids.

Appellee began his case with his own testimony. He described the history of events following the 2004 award of sole custody to him, explaining that appellant started with normal visitation but that she continued the same conduct that had resulted in the change of custody in first place, *i.e.*, that she was spending the night with Doug James even on nights that she had Josh for visitation and encouraging Josh to lie about it. He then sought and was granted a limitation of visitation "until we could get things back on track." He said that as things had improved, he had increased Josh's visitation with his mother.

Appellee explained that most of the time, Josh's interaction with Paige was good; that the last eleven months since the motion for change had been filed, the situation had been stressful; and that he thought it was based in large part on comments that appellant would make to Josh about appellee and Paige. He stated that Josh and Paige would cook together;

that Paige was part of the Boy Scout program; that he had seen them sit down and work puzzles together and play games; and that they had all three gone fishing two weeks ago on Lake Earling. He said that when Josh and Paige had conflicts, it would generally take the form of Paige asking Josh if he had homework or if he had picked up his clothes and that Josh would get a tone in his voice or do the task half-way, just to get under her skin. He explained that Paige would start off patient, but then she would get to the point where she would tell him that if he did not change his behavior, he would have to go to his room. He said that sometimes the conflict would escalate to where she denied Josh television privileges or something similar. He stated that Josh was always given a warning first; that there had been a lot of testimony about using baseball games as a form of punishment; that he agreed, to a point, that in punishing Josh by not allowing him to go to a game also let down his team members and that sort of thing, but that his responsibility was to Josh and that he had to punish a child with what worked; and that it was a tough punishment for him to administer because he loved baseball and going to the field also, but if that was what got Josh's attention, that was what he was going to do. He said that he and Josh do Boy Scouts together; that they turkey hunt in the fall; and that Josh is welcome to go deer hunting every time he goes, but that sometimes Josh would rather stay home.

Appellee testified that Jimmy was always welcome at his house; that Josh was not forbidden to call other family members; that he has no problem with Josh viewing the incoming calls on caller I.D.; that they have a very busy life, with Josh and Crystal both in sports and other activities; and that he would be the first to say that his primary objective

when he gets home is not to check the phone calls, but that he has Josh return any phone calls of which appellee is aware.

Appellee acknowledged that he was shocked both times that Crystal ran away from home; that everything seemed fine the nights before and then she would be gone in the morning. He also acknowledged that she is sexually active and that she was suspended once from school for having alcohol on campus. He agreed that family counseling would be a good idea. He also acknowledged that it was probably important for him to spend time alone with Josh.

Appellee explained why he did not think custody should be changed. He said that Josh needs a stable environment; that he needs the same home to go to; and that he needs the same routine. Appellee stated that he has lived in the same house and held the same job for twenty years; that the only change he had introduced was a new wife and stepsister, which occurred before the change of custody in 2004; that he has always participated in the children's lives and activities; that he attends every parent-teacher conference; and that he loves both of his sons "to death."

Jonathan Jordan and Crystal Cravey, Josh's stepbrother and stepsister, and Nancy "Paige" Smelser, appellee's wife and Josh's stepmother, testified, each offering their versions of events that had already been presented through other witnesses.

James Smelser, appellee's father and Josh's grandfather, testified that he had observed Josh and Paige together; that most of the time, they got along fine; that they had good times and bad times; that Josh's relationship with appellee is fine when Josh is in a good mood; and

that he has never observed appellee and Paige do anything to Josh that he did not approve, although one time Josh wanted a glass of tea at his house and Paige told Josh no. James stated that he, in essence, told her it was his house and that he was giving Josh permission to drink some tea.

Wayne Reddick, the Scout Troop Master, testified that appellee was one of his assistant scout masters, and that he regarded appellee as a very good father; that appellee was involved in Josh's activities; that he had observed appellee and Paige interact with Josh and other troop members; and that he had never seen them get irate with the boys.

Angela Sherman, who knew appellee and Paige through the Boy Scouts, testified that she had had the opportunity to observe their family interacting with each other and that they were just like any normal family, with no hostility or bitterness. She stated that there was love there; that she had seen appellee discipline Josh and that he handled it very well; and that she had observed Josh and Paige one on one and that "they are good together." She said that she saw Josh acting disrespectfully to Paige one time and that Paige backed off and let appellee handle it.

Our *de novo* review of the evidence in this case leads us to the conclusion that the trial court did not clearly err in determining that there had not been a material change of circumstances. Giving due deference to the trial court's superior position to judge the witnesses' credibility, we are simply not left with a definite and firm conviction that it made a mistake.

2) *Error of Law*

In its letter opinion dated July 20, 2007, the trial court explained in pertinent part:

When all is said and done, I agree with the ad litem. There simply has not been a material change of circumstances involving the *custodial parent* (emphasis added) that would get us to the next hurdle, the best interest of Josh Smelser. As pointed out by the ad litem, there have been some issues regarding other children with the Charles Smelser household, but even the issues raised there, in the Court's opinion, failed to amount to a material change.

At the time of the hearing, it is clear that the plaintiff's condition in life had improved dramatically. But this can only be taken into consideration if there has been a material change of circumstance in the custodial parent's home or lifestyle.

If it should be determined that a material change of circumstance has occurred within the Charles Smelser home, I would nevertheless be reluctant to amend the current custody order and change custody to the plaintiff. Notwithstanding her significant improvement in several areas of her life, Ms. Loe still has way too much history, with a poor past and recent history, for the Court to be convinced that she has turned her life around. She needs to maintain her employment and maintain her new and improved lifestyle.

(Emphasis, along with parenthetical notation, present in original.) Appellant contends that the trial court erred as a matter of law in focusing its attention on whether there were demonstrated material changes in the circumstances of the *custodial parent*, *i.e.*, appellee. In making her argument, she relies in part upon *Walker v. Torres*, 83 Ark. App. 135, 137-41, 118 S.W.3d 148, 150-52 (2003), where our court explained:

In determining whether a change in custody is warranted, the trial judge must first determine whether there has been a material change in circumstances *of the parties* since the most recent custody order. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001). While custody is always modifiable, in order to promote stability and continuity for the children and to discourage repeated litigation of the same issues, our courts require a more rigid standard for custody modification than for initial custody determinations. *Vo, supra*.

. . . .

In a recent opinion, this court addressed the issue of a material change in circumstances *based upon a major change in circumstances on the part of the noncustodial parent*

coupled with a minor change in the circumstances of the custodial parent. In Mason v. Mason, 82 Ark. App. 133, 111 S.W.3d 855 (May 7, 2003), this court affirmed the decision of the trial court to change custody based on "radical and positive change" in the noncustodial parent's circumstances coupled with "evidence of a further decline in [the custodial parent's] already dismal circumstances."

In the present case, Walker, as the *noncustodial parent*, has made a positive change in his circumstances. Walker presented testimony that he was taking business classes, had remarried, and had purchased a home since the time of the original decree. Walker further testified that Torres had violated the decree by denying him visitation, failing to provide him with a phone number to contact the child, and by failing to maintain a wholesome, stable living environment for the child. The evidence established that Torres was temporarily residing with her parents and that she had left a number of jobs under adverse circumstances since the time of the original decree. Torres also had an ongoing relationship with a man who was not a positive influence on the minor child, and the trial court expressly did not discredit the testimony concerning the adverse nature of his influence. In *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999), the supreme court noted that a *noncustodial parent's remarriage is a matter that can be considered by the trial court in determining whether there has been a change in circumstances. Thus, the trial court was not correct in stating that Walker's positive changes did not "count."* Moreover, as in *Mason, supra*, the trial court here stated that there was "no question" in his mind that it would be in the child's best interest for Walker to be awarded custody. However, we are not unmindful that over a year has now passed since the custody hearing was held and circumstances can and do change. Accordingly, we reverse and remand to allow the trial court to conduct such further proceedings as may be necessary, and to consider the circumstances of this case in light of our decision in *Mason, supra*, which was rendered after the order appealed from in the instant case.

(Emphasis added.)

The *Walker* opinion relies upon *Mason v. Mason*, 82 Ark. App. 133, 111 S.W.3d 855 (2003), where the trial court had been reluctant to award custody to the parent whom it did originally; however, it regarded the other parent as an even less desirable choice. When a change of custody was later sought, the custodial parent's situation had gotten somewhat worse while the noncustodial parent's situation had improved dramatically. The trial court changed custody to the parent whose situation had improved so dramatically. Our court

affirmed that decision. In *Walker*, as in *Mason*, the trial court was convinced, that at the time of the hearing on the motion for change of custody, the child would be better off living with the noncustodial parent because his situation had improved dramatically, while the custodial parent's situation "had not changed," *i.e.*, she still lacked a stable home, marriage, and employment. Yet, in *Walker*, the trial court determined that it could not even consider the substantial improvements in the noncustodial parent's situation, *i.e.*, that those changes "did not count," when considering a change of custody. On review, our court reversed and remanded, instructing the trial court to consider the circumstances of the case in light of the opinion in *Mason*. Examining the *noncustodial* parent's circumstances and placing primary emphasis on them under the circumstances of those cases makes sense.

Here, in its letter opinion, the trial court noted that appellant had made significant improvements in several areas of her life, but also noted that she had "too much history" for the court to be convinced that she had turned her life around. As the trial court explained, even if it had found a material change of circumstances regarding appellee as the custodial parent, the court would have been reluctant to change custody back to appellant at that point because she had not had a long enough history of improvement. Thus, unlike *Mason* and *Walker*, after hearing all of the evidence here, the trial court did not make a determination that Josh should live with appellant. To the contrary, the trial court explained why it would be reluctant to change custody to appellant even if it had determined that there had been a material change in circumstances concerning the custodial parent, appellee. Therefore, under the circumstances of this case, the trial court correctly focused its attention on the custodial

parent's circumstances to determine whether there had been a material change in them. Moreover, despite the trial court's language to the contrary, in its overall review of the evidence, the trial court clearly took note of appellant's improved circumstances and also considered Josh's best interests.

Affirmed.

VAUGHT and BAKER, JJ., agree.